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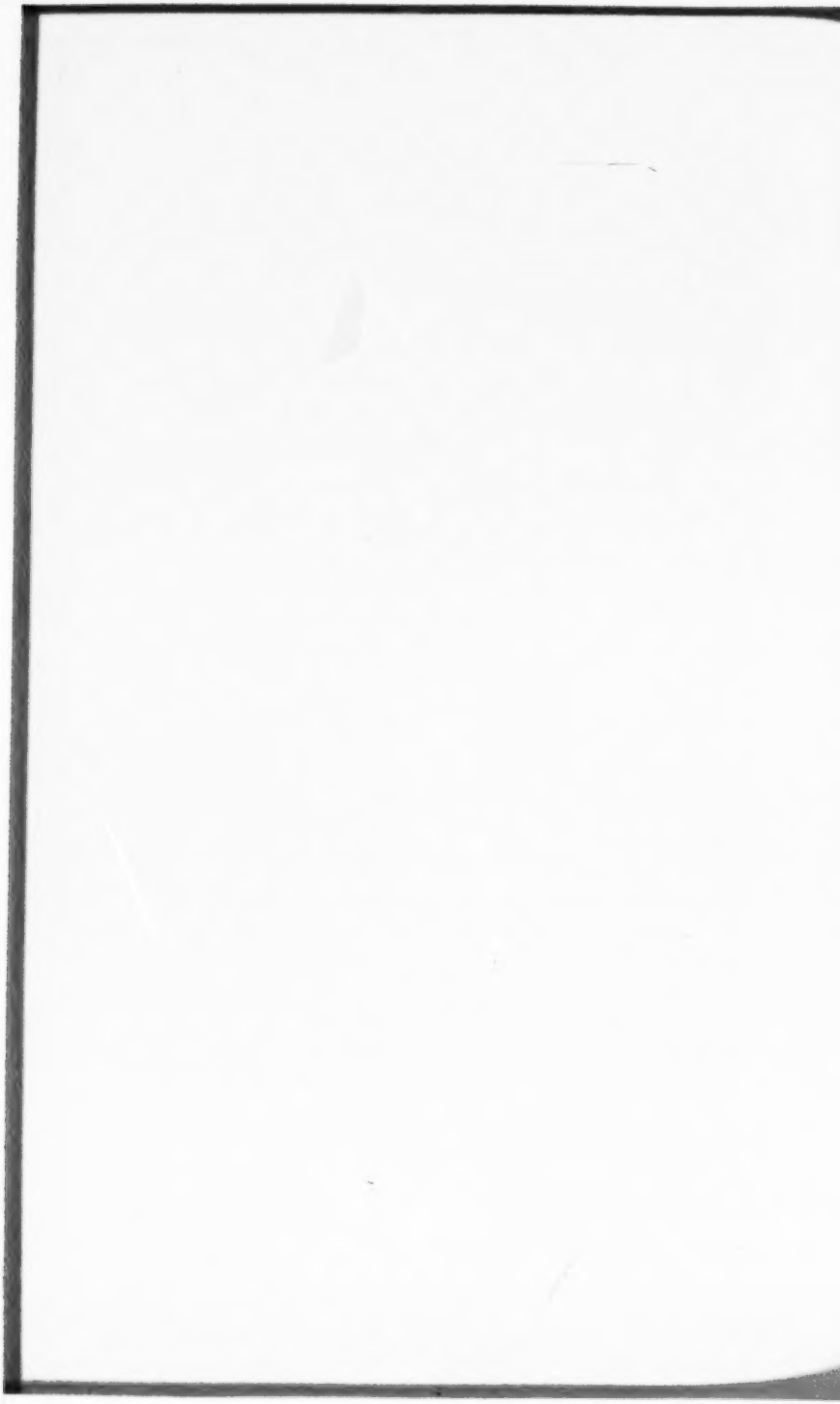

# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 321

NORMAN F. SCHMITT, IN HIS OWN RIGHT AND AS AGENT AND REPRESENTATIVE OF R. W. BAIRD, JR., ET AL., PETITIONERS

*v.*

WAR EMERGENCY PIPELINES, INC., AND RECONSTRUCTION FINANCE CORPORATION

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas (R. 18-25) is reported at 72 F. Supp. 156. The opinion of the United States Court of Appeals for the Eighth Circuit (R. 83-89) is reported at 175 F. 2d 335.

### JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1949 (R. 89). The petition for a writ of certiorari was filed on September 9, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED

1. Whether War Emergency Pipelines, Inc., which constructed and operated the "Big Inch" and "Little Big Inch" pipelines for Defense Plant Corporation and Defense Supplies Corporation during World War II, was a common carrier subject to Part I of the Interstate Commerce Act and therefore exempt from the overtime provisions of the Fair Labor Standards Act by reason of Section 13(b)(2) thereof which excludes "any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act."

2. Whether, assuming that "any employee" is not to be construed literally so as to extend the exemption to activities wholly extraneous to carrier functions, petitioners, who were employed in the construction of "Little Big Inch" and the extenson of the "Big Inch" after War Emergency Pipelines had begun operation of the "Big Inch" in interstate oil transportation, were engaged in the carrier activities of War Emergency Pipelines.

## STATUTES INVOLVED

Section 13 of the Fair Labor Standards Act, 52 Stat. 1067, 29 U. S. C. 213, provides in pertinent part as follows:

> (b) The provisions of section 7 shall not apply with respect to * * * (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

Section 1 of the Interstate Commerce Act, as amended, 49 U. S. C. 1, provides in pertinent part as follows:

> (1) That the provisions of this part shall apply to common carriers engaged in—. * * *
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water;
>
> * * * * * * * *
>
> (3) (a) The term "common carrier" as used in this part shall include all pipeline companies; * * *. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof * * *.

STATEMENT

At the outbreak of World War II, the existing means of transporting petroleum to the Atlantic seaboard were found to be inadequate by the Office of Petroleum Coordinator for War. The construction of two pipelines—"Big Inch" and "Little Big Inch" was recommended (R. 33-34, 35-36). Since the Government lacked qualified personnel, respondent War Emergency Pipelines, Inc. (WEP), a Delaware corporation, was organized by eleven

major oil companies to construct and operate the proposed pipelines without fee or profit to itself (R. 34).

In 1942 and 1943, contracts were entered into between WEP and Defense Plant Corporation (DPC) and Defense Supplies Corporation (DSC) —government corporations created by Reconstruction Finance Corporation (RFC) pursuant to 54 Stat. 572, 15 U. S. C. 606b—whereby WEP undertook to construct, manage, and operate the pipelines (R. 35-36; Ex. A, R. 58; Ex. C, R. 69). The terms of the agreements provided *inter alia* that WEP would act for DPC and DSC as agent, that WEP would be indemnified against liability, and that title to all land and facilities would be vested in DPC and DSC. The contracts were faithfully performed by the parties thereto (R. 38).

On July 1, 1945, by joint resolution of Congress, DPC and DSC were dissolved and their assets and liabilities transferred to RFC (R. 35). On January 31, 1946, WEP relinquished operation and control of the pipelines to RFC (R. 85).

This action is brought to recover overtime compensation, liquidated damages and attorneys fees, under Section 16(b) of the Fair Labor Standards Act, 29 U. S. C. 216(b). Petitioners were employed by WEP as time and material men to check, inspect and receive interstate shipments of materials and supplies used in the construction of the pipelines (R. 38). The services here involved were all performed subsequent to the date on which WEP

began using the "Big Inch" in interstate oil transportation. Part of the construction work consisted in the extension of the "Big Inch" beyond its original terminus to the East Coast; the rest went into the building of the auxiliary "Little Big Inch" (R. 88).

The District Court held that WEP is a common carrier subject to Part I of the Interstate Commerce Act and that its employees are, therefore, exempt from Section 7 of the Fair Labor Standards Act by reason of Section 13(b)(2) thereof, which excludes "any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act." Judgment was entered for respondents. On appeal, the Court of Appeals affirmed; it concurred in the decision of the District Court that the pipeline operations of WEP are exempt from Section 7 of the Fair Labor Standards Act and further held that petitioners were engaged in the exempt carrier activities of WEP.

## ARGUMENT

1. Section 13(b)(2) of the Fair Labor Standards Act, *supra*, p. 2, exempts from the provisions of Section 7 "any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act."

Petitioner does not seem to deny that oil pipeline companies are common carriers under the Interstate Commerce Act, or that WEP is engaged in the transportation of oil within the meaning of

that statute. But petitioner contends that WEP is not a "pipeline company" because it does not own the pipeline facilities or make a profit.

The statutory language is clear, however, and it contains no exceptions such as are urged by petitioner. Section 1(1) of the Interstate Commerce Act provides that the Act "shall apply to common carriers engaged in * * * the transportation of oil * * * by pipe line." Section 1(3) not only declares that "the term 'common carrier' as used in this part shall include all pipeline companies,"[1] but defines "transportation" as including "locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, *irrespective of ownership* or of any contract, expressed or implied, for the use thereof." The inclusion of the phrase "irrespective of ownership" in the statutory definition of transportation demonstrates clearly that coverage under the statute does not depend upon ownership. *United States* v. *B. & O. R. Co.*, 333 U. S. 169, 176. We submit that the factor of ownership is as irrelevant to the question of whether a company is a "pipe-line company" within the Act as it is to the question of "transportation." Surely Congress did not intend that a company which operates an interstate pipeline system be excluded from the scope of the Act because it does not own the pipelines it operates. Nor does the statute contain any

[1] See *Valvoline Oil Co.* v. *United States*, 308 U.S. 141, and *Champlin Refining Co.* v. *United States*, 329 U.S. 29.

exemption for companies which have agreed not to make a profit. Since the law contains none of the exceptions which petitioner seeks to read into it, WEP unquestionably is an employer subject to Part I of the Interstate Commerce Act, and petitioner's arguments as to the status of the company are baseless.[2]

2(a). Assuming *arguendo* that the words in Section 13 of the Fair Labor Standards Act—"*any employee* of an employer subject to the provisions of Part I of the Interstate Commerce Act"—should not be construed so as to extend the exemption to any activity by a carrier which is wholly extraneous to its carrier functions, we submit that, on the facts of this case, the court below properly held that petitioners were employed in the carrier activities of WEP and exempt from the benefits of the Fair Labor Standards Act.[3]

Crude oil was first introduced into and transported interstate through the "Big Inch" on December 31, 1942 (R. 41). After that date, petitioners were employed as time and material men to check, inspect and receive interstate shipments of materials and supplies used in the construction of

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[2] An alternative reading of the petition is possible, namely, that the pipelines were, in substance, directly operated by the United States (Pet. 5-6). But petitioners cannot be understood to be pressing this position, which would automatically exclude them from the benefits of the Fair Labor Standards Act. Section 3(d) of the Act exempts "* * * the United States or any State or political subdivision of a State, * * *."

[3] Since the decision below concedes that the term "any employee" should not be read literally, it does not conflict with the cases cited by petitioners (Pet. 19-22).

the auxiliary "Little Big Inch" and the extension of the "Big Inch" beyond its original terminus (R. 88). Although petitioners emphasize that their duties pertained only to the construction of the extension of the "Big Inch" and the construction of the "Little Big Inch" *before* oil was introduced into them, such work was performed *after* WEP had begun operation of the "Big Inch" and thus acquired the status of a common carrier under Section 1 of the Interstate Commerce Act.

The work upon which petitioners were engaged, the extension of existing pipelines in use, was clearly not wholly extraneous to WEP's operations as a pipeline company, the "wholly extraneous" test being crucial in the determination of coverage *vel non.* As the court below pointed out, "All the construction work thus merely went to increase the pipeline facilities, and in relation to Emergency Pipelines' intended and actual operation of them served only to enlarge the scope of the latter's carrier activity. * * * In sound practical aspect, therefore, the employees of Emergency Pipelines engaged in the construction work involved were in the same position and relationship as the employees of a railroad, for example, who are engaged in extending its lines, adding to its tracks, or otherwise augmenting or improving its carrier facilities" (R. 88). Cf. *McComb* v. *Union Stock Yards & Transit Co.,* 168 F. 2d 375 (C. A. 7); *McComb* v. *McKay,* 164 F. 2d 40 (C. A. 8); *Keele* v. *Union Pac. R. Co.,* 78 F. Supp. 678 (S. D. Calif.);

and see also *Virginian Ry.* v. *Federation,* 300 U. S. 515, 556-557.[4]

(b). Finally, the question is not one of general importance. Whether these particular employees were engaged in activities which were "tenuously and negligibly related" (Pet. 23) to the carrier activities of an employer subject to Part I of the Interstate Commerce Act is basically a factual issue of limited applicability. It is questionable whether a decision by this Court would necessarily be applicable in future litigation involving other carriers and other employees under different operative employment facts. The situation herein is a unique one which arose under peculiar wartime condi-

[4] The cases relied upon by petitioners are not at all apposite. In *Jackson* v. *Northwest Airlines,* 70 F. Supp. 501 (D. Minn.), and *Roland* v. *United Airlines,* 75 F. Supp. 25 (N. D. Ill.) the work involved was the modification of army planes by commercial airlines for the Government during wartime, which work had no effect upon the commercial activities of the airlines. The question raised in *Walling* v. *Connecticut Co.,* 62 F. Supp. 733 (D. Conn.), affirmed, 154 F. 2d 552 (C. A. 2) was whether powerhouse employees of a local trolley carrier, who would be exempt from the Fair Labor Standards Act under Section 13 (a) (9) if engaged in producing electricity solely for trolley operation, are not exempt if a substantial part of the power produced is sold to other users. Cases arising under the Federal Employers' Liability Act prior to its amendment in 1939 (53 Stat. 1404, 45 U. S. C. 51) such as *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 243 U. S. 43 (Pet. 23), are irrelevant. Prior to that amendment an injured employee could recover only if directly engaged in interstate commerce; the act now applies to employees whose duties are the "furtherance of interstate * * * commerce" or which "directly or closely and substantially, affect such commerce." (45 U. S. C. 51). The question raised herein is not whether the employees' work is directly in commerce but, as we have stated above, whether it is wholly extraneous to the carrier activities of the employer.

tions. Petitioners have made no showing that the outcome of this litigation will affect numerous other workingmen, nor have petitioners shown that the immediate question is a continuing one.

### CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
*Solicitor General.*
H. G. MORISON,
*Assistant Attorney General.*
SAMUEL D. SLADE,
BENJAMIN FORMAN,
*Attorneys.*

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